Online Dispute Resolution (ODR)

WORKSTREAM FINDINGS &
RECOMMENDATIONS

JUDICIAL COUNCIL
OF CALIFORNIA

INFORMATION TECHNOLOGY
ADVISORY COMMITTEE

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Document Revisions

Version	Date	Name	Change Description	Sections
0.1	3/11/2020	ODR Workstream Members	Workstream review and contributions for final Draft.	All
1.0	4/19/2021	ITAC	Report for ITAC review	N/A
2.0	6/24/2021	Technology Committee	Report for Technology Committee review	N/A

Document Location

This document is published at the following location: www.courts.ca.gov/itac.htm

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1.0 EXECUTIVE SUMMARY

The Online Dispute Resolution Workstream was tasked by the Judicial Council's Information Technology Advisory Committee (ITAC) with developing a roadmap for courts interested in pursuing online dispute resolution (ODR). Specifically, the workstream's focus was on

- providing a summary of the ODR landscape;
- summarizing the outcomes of court-offered ODR programs;
- defining practice areas and potential applications for ODR in the judicial branch;
- developing guiding principles and key considerations when making plans for ODR; and
- listing rules and statutes that may need to be amended or drafted.

The workstream's efforts were informed in part by Chief Justice Tani G. Cantil-Sakayue's vision for "Access 3D": "Access should be remote, physical, and equal. … Remote access means increasing our ability to conduct branch business online to file court cases, access case information and records, and to make video appearances where and when appropriate." The workstream also aligns with Goal 1, Promote the Digital Court, in the judicial branch's *Strategic Plan for Technology 2019–2022*.

Dispute resolution and mediation are moving increasingly to remote and online. Particularly during the COVID-19 pandemic, the public's movement within their communities has been restricted and courts have been required to limit the number of people who are in court facilities. These and other factors contributed to the creation of various forms of online and remote mediation.

While technology has been used in multiple ways to assist in mediation and dispute resolution, the work of this workstream is focused on a limited definition of court-related ODR: a public-facing digital space in which parties can convene to resolve their dispute or case.

During the workstream's evaluation of ODR, it became apparent that the currently evolving COVID-19 pandemic made this workstream's efforts particularly relevant and timely. Varying shelter-in-place orders, limitations on the availability of court services, delays and a backlog in case processing, and restricted access to court facilities required the delivery of court services to address new and different challenges. As a result, courts are moving quickly to adopt new forms of service delivery, including online dispute resolution. The relative newness of ODR in the court environment has resulted in some courts struggling to attract court users to this relatively unknown method of providing service. Recommendations by this workstream should ensure guidance and warnings for early adopter courts.

This report provides the workstream's analysis of the current state of ODR as used in courts across the United States and makes the following recommendations:

Recommendation 1: *Master Service Agreement.* Publish a request for proposal (RFP) and select vendors for branchwide master service agreements with ODR solution vendors for the benefit of interested judicial branch entities.

Recommendation 2: *Funding for Pilots.* Explore funding options to enable a group of pilot courts to launch ODR in identified usage scenarios.

Recommendation 3: *Information Sharing.* Encourage early adopter and pilot courts to develop best practice reference guides as examples for other courts.

Recommendation 4: *Buy vs. Build.* Encourage courts considering a custom solution to engage in a comprehensive buy vs. build cost-benefit analysis. A custom branchwide solution can be considered because of market immaturity.

Recommendation 5: *Key Considerations.* Early ODR adopter and pilot courts should take into account a variety of key considerations prior to committing to and implementing ODR.

Recommendation 6: *Metrics and Measurements.* Clearly define desired outcomes and goals, using data gathered prior to and during ODR implementation.

The workstream approached its work and the ultimate recommendations with the following key concepts in mind:

- *Provide access to justice.* ODR is an additional, optional mechanism.
- *Greater engagement by litigants.* ODR allows litigants who may not be able to participate in alternative dispute resolution proceedings at a courthouse to engage in a location and format that is convenient and broadly available.
- *Fairness.*
- *Process efficiency in dispute resolution.*

Recommendations for rules or legislation focus on ensuring courts have the authority to explore varied approaches, as the processes around ODR implementation mature through experience. The workstream has identified areas for potential rule and legislative changes for consideration by ITAC and other appropriate Judicial Council advisory committees as they continue this work.

2.0 BACKGROUND

2.1 ODR Definition

Online dispute resolution is an umbrella term generally directed to the use of a technology to settle disputes between parties. ODR is a generally accepted dispute resolution technology developed in private sector settings to facilitate the quick resolution of conflicts through alternate dispute resolution.

Court-related ODR is described by the National Center for State Courts as "a public-facing digital space in which parties can convene to resolve their dispute or case."[1] Court-related ODR presents an opportunity for courts to expand services while reducing costs and improving litigants' experience.

For purposes of their work, the workstream adopted a working definition of ODR as "an online process in which the parties themselves, or with the assistance of a neutral third party, can resolve their issues to the parties' mutual satisfaction without requiring a court appearance."

2.2 How ODR Works

While the details of each implementation may vary, court-related ODR implementations generally share some commonalities.

Provides a platform. ODR provides a platform that enables litigants to communicate about disputes online and reach a resolution outside the courthouse in an agreement that can be enforceable by courts. Parties to ODR use remote appearance technology either by video, audio, or in text to attempt to resolve court cases. The parties can work directly with each other (without any outside intervention), or through the use of a neutral to facilitate discussions, or through a combination of both. A neutral can be a judicial officer, a mediator, or be electronically facilitated through the use of artificial intelligence.

Facilitates tasks. ODR can be used to facilitate any of a number of the parties' tasks toward conflict resolution. ODR systems can triage users by providing legal information about procedural requirements as well as information about their rights and obligations in plain English. Well-designed ODR systems may include elements that help the parties narrow the focus of the negotiations to key issues and provide a convenient way to simplify the process of gathering information to meet documentation requirements.

Facilitates party-to-party discussions. ODR technology can also aid the mediation of disputes by facilitating party-to-party discussions in a structured asynchronous chat

[1] National Center for State Courts, "What is ODR?" (undated), www.ncsc.org/odr/guidance-and-tools.

environment. ODR systems may also facilitate discovery and the sharing of evidence and materials with other parties. An optional component of ODR platforms allows negotiation support through human mediators or artificial intelligence algorithms to suggest solutions and structure negotiations.

Provides resolution functions. ODR technologies can also be used in resolution functions such as suggesting offers for settlement and facilitating formalization of settlement terms. Settlement terms can include payment plans and other terms as the parties agree.

Provides anytime, anywhere access. Access to ODR is available 24 hours a day, any day of the week, while the court is open or closed, from any location in the world, so long as each party has access to the internet. This allows each party the ability to respond to others asynchronously, at their own convenience, while in the comfort of their own homes. Individuals can access ODR at any time during or outside of court hours, leave messages for other parties, and be notified of responses.

Mandatory vs. voluntary

ODR systems can be established as mandatory or voluntary programs. Both approaches have pros and cons and both can work, but each is not without its challenges and detractors.

A mandatory ODR program requires users to participate in the ODR program. This can be done in many ways, one of which includes an "opt-out" approach. Where a court adopts an opt-out approach, the user is automatically placed into the ODR program unless the user opts out. In such an approach, the courts have often defined very limited criteria for the user to be eligible to opt out, thereby reducing the number of users who can decline to use the ODR program.

Alternatively, the court can adopt a voluntary ODR program. In a voluntary program, the court provides the ODR service but does not mandate or require court users to participate in it. Instead, the court provides the court user with an opportunity to opt in. The benefit of this approach is that court users are not required to participate in ODR, but may if they choose. Courts using this approach have not seen the significant level of success in user participation or user engagement when compared to mandatory ODR programs.

When deciding whether to implement a mandatory versus a voluntary ODR program, courts must be sensitive to the fees charged to use such a program. One school of thought is that where an ODR program is mandatory, courts should not charge a fee to the user since participation in the program is required. In light of this view, most courts have adopted a philosophy that where an ODR program is mandatory, it must be free. On the other hand, where it is voluntary and the parties are opting in to participate, courts have often charged a nominal user fee.

Additionally, if the court chooses to implement a mandatory ODR solution, the court must also consider the basic access issues that electronic appearances raise. In selecting a mandatory ODR system, to ensure access to justice the court may need to take on new and increased responsibilities to make electronic stations available to those court users who do not have access to computers or the internet. Geography and the financial solvency of each court may weigh heavily in this decision, as will the availability and strength of regional internet connections.

2.3 Benefits of ODR

It has been long believed that resolutions of cases are more common when the court can get all of the parties into one location with a judge. In ODR this reasoning is extended into the electronic realm. The benefit of ODR, especially in the time of COVID-19, is that the parties can participate from anywhere in the world, at any time of day, while not in the courthouse. These benefits include, for example:

- *Convenience:* Litigants never have to leave their homes or their offices to engage in case resolution, which appeals to many who are uncomfortable going to court or who have health, geographic, or transportation challenges.
- *Increased efficiency in reaching resolutions:* Cases can be resolved more quickly than in the regular court process.
- *Affordability:* ODR can be implemented to provide low-cost or free access to the courts.
- *Increased public engagement with the justice system:* ODR can increase public participation in the justice system to people with and without great means so long as they have access to a computer and the internet.
- *Procedural fairness:* ODR can provide "blind" participation by litigants. This process can prevent explicit or implicit bias in the justice system as those participating will not be aware of the other's gender, clothing, socioeconomic level, demographics, race, or religion because those characteristics may be unobservable from the ODR platform.
- *Process efficiency for courts:* ODR may reduce the time to resolution and the staff/judicial time needed per case.

ODR uses technology to facilitate problem resolution. ODR is not appropriate for every legal issue but holds promise for high-volume cases involving transactional disputes (e.g., traffic offenses, small claims, low-conflict family court cases, landlord-tenant cases, or tax assessment appeals).

3.0 GOAL ALIGNMENT

Online dispute resolution is a key initiative outlined in the judicial branch's *Tactical Plan for Technology* for 2019–2020 and 2021–2022. The Information Technology Advisory Committee included the ODR project in its 2020 annual agenda and initiated a workstream to accomplish the project's goals and objectives. The primary purpose of the ODR project is to increase Californians' access to justice using online tools and technology, which aligns with Goal 1, Promote the Digital Court, in the judicial branch's *Strategic Plan for Technology 2019–2022*.

Consistent with the Chief Justice's vision for remote hearings in non-criminal case types, an ODR program provides parties an alternative method to resolve their disputes using a digital platform.

4.0 ONLINE DISPUTE RESOLUTION WORKSTREAM

4.1 Charter

The Online Dispute Resolution Workstream's charter, as summarized in the ITAC Annual Agenda, is to identify and evaluate available ODR technologies and potential scenarios in which ODR might benefit the judicial branch and its court users. The workstream had the following key objectives:

- Identify and evaluate available ODR technologies.
- Review findings from existing court-offered ODR programs.
- Evaluate and describe use-case scenarios where ODR might be beneficially deployed in the judicial branch.
- Survey and document best practices in evaluating feasibility and program design to maximize access to justice.
- Review rules and statutes to identify areas where possible amendments will be needed.

4.2 Structure

After an initial assessment of the ODR workstream's goals and the expertise and backgrounds of the membership, it was determined that the best course to achieve the group's charter expeditiously was to organize into two tracks – one for research and another for planning and implementation. The research track was tasked with studying the landscape of available solutions and reviewing the findings and effectiveness of existing court-offered ODR programs. The planning and implementation track's focus included identifying scenarios, design, and best practices for successful ODR deployment in the judicial branch and reviewing rules and statutes for possible amendment. After successfully completing their tasks, the tracks were merged to document their findings

and recommendations in this report. The roster of workstream members is included in Appendix B.

4.3 Activities

The workstream received information from three primary sources: presentations from commercial ODR vendors, presentations from state courts that have engaged in ODR implementations, and a literature review.

Commercial ODR Vendor Presentations

A number of commercial vendors currently provide solutions in the court ODR market sector. The workstream invited presentations from the following four commercial ODR vendors:

- Matterhorn (Court Innovations Inc.)
- Modria (Tyler Technologies)
- TurboCourt (Intresys, Inc.)
- ImageSoft (Resolve Disputes Online)

All of the vendors have a similar approach to ODR, but each provides its own unique platform. These platforms allow litigants to engage with each other online through the platform in an asynchronous fashion, exchanging messages in an effort to resolve disputes. A court-provided mediator may also become involved to assist the parties in reaching a resolution.

Communication between the litigants and the mediator can be private; between one party and the mediator; or with all participants involved, including attorneys for represented parties. During the exchange of information, litigants can upload or share documents or evidence with one another. These electronically stored documents can be saved. Once litigants have agreed on a resolution, a legally binding agreement is produced and executed electronically by the parties.

All the vendors reported their products to be highly configurable to allow the implementation to conform to local court requirements. Configurability allows for automated notification—notifying participants at various stages that activity has taken place or prompting the participants to engage further. Timing requirements or expirations of time can also be part of the automated notifications.

Configurability allows these commercial ODR solutions to be used in various case types. The most common case types included small claims, traffic, ability to pay, family (custody, parenting, child support), civil debt, and landlord-tenant (debt payment).

Vendors noted that their products can be stand-alone implementations or integrated with local court case management systems already in place. Some of the vendors noted

the ability to integrate with online commercial video vendors (Zoom, GoToMeeting, etc.), allowing for synchronous communication if desired. The ODR programs can be used pre-filing or post-filing.

Common features included a robust set of data analytics and reporting features. Developing key performance indicators (KPIs) was noted to be an important part of engaging in an ODR implementation. Vendors highlighted the importance of courts doing work ahead of engaging with ODR to assess the area in which they propose to implement ODR and determine and measure the issue they are trying to solve. ODR is a tool to address many different issues:

- Provide access to justice;
- Reduce defaults;
- Allow litigants the convenience to access court anytime/anywhere;
- Reduce court backlog/wait times/staff time;
- Scale a public service; or
- Move online to improve customer service and satisfaction.

Determining and measuring the case type and issue involved before implementation is imperative to implementing and improving the service through the use of KPIs after implementation.

Vendors uniformly advised that success depends heavily on courts' willingness to change their processes and their engagement with stakeholders and community partners.

Commercial vendors noted common implementation time frames of four to eight weeks. The pricing structure included options for transaction-based fees (based on the number of ODR transactions processed) or subscription-based fees (for a "bucket" of transactions).

Payment for commercial ODR services can be borne by the court or passed on to the court user.

Review of State Court Implementations

Numerous state courts have begun implementing ODR systems. Some courts are using commercial vendors. Others, notably Connecticut and Utah, have built their own ODR platforms. Still others have faced challenges in getting their ODR plans and projects off the ground.

Connecticut—Traffic Online Ticket Review

In 2018, Connecticut implemented an online end-to-end statewide traffic Online Ticket Review Program. The issue addressed by the program is traffic and roadway safety. Speedy resolution of traffic violations contributes to roadway safety behavior

modification. Connecticut has accomplished its goals by implementing an end-to-end traffic citation processing platform that allows quick and efficient traffic ticket resolution and payment.

The Connecticut traffic Online Ticket Review Program, funded by the federal Department of Transportation, begins with electronic citations. Seventy-eight percent of Connecticut's traffic citations are now immediately in the system through electronic citations.

Once the online citation has been approved by the prosecutor, traffic tickets are accessed online through the ODR platform by traffic offenders. Traffic offenders receiving courtesy letters are provided with a QR code or citation number that allows direct online access to their case. Traffic offenders have the option to plead no contest and pay their ticket, request a personal appearance, or request online review. If an online review is requested, the traffic offender may provide a written narrative and evidence for review by a prosecutor. A prosecutor reviews the items submitted by the offender. Prosecutors also have access to photos or evidence submitted at the time of the citation by law enforcement and access to DMV records. Once submitted, review by a prosecutor may result in an offer or proposal for a lesser charge or reduced fine. If an offer is made by the prosecutor, the violator is advised and can accept the offer and pay the fine immediately online.

The result of the Connecticut Traffic Online Ticket Review has been to reduce adjudication time from 180 days to 56 days and reduce the number of cases not prosecuted from 30 percent to 16 percent. Users have responded positively, noting meaningful and convenient traffic adjudication. Court workload and hearings have been reduced. Most importantly, driver safety has improved.

Connecticut is currently implementing an ODR pilot program in small claims and collections cases.

Utah—Online Dispute Resolution Pilot Project

Based on their access-to-justice commitment in a geographically large state with a significant rural population, the State of Utah embarked on developing a custom ODR platform in 2016. One of the reasons for developing an in-house solution was to offer the service at no or low cost. The program was developed with a focus on reducing the number of defaults in debt collection matters and allowing broader access for litigants in small claims matters.

Engaging with stakeholders, including members of both the plaintiff and defendant communities, was a priority. Development emphasized usability, particularly for non-represented defendants. Public launch of the pilot court in 2018 is expanding to a statewide implementation in 2020–21. Utah Supreme Court Justice "Deno" Himonas, a champion of the Utah ODR platform, notes that marketing will be one of the challenges

facing the expansion plans. Their current plan is a statewide rollout for other Utah courts to launch ODR implementations.

Volunteer facilitators (rather than mediators) are used to assist as "navigators" for new users. These impartial court representatives assist in platform navigation, filling out forms, mediating terms of a settlement, review and filing of the settlement agreement, or preparing a trial prep document for the court in cases where settlement cannot be achieved online.

Utah's ODR program, financially supported by the court, is an "opt-out" program, requiring participation unless the litigant has a reason not to participate. They have found that the public wants this type of service with few opting out. The results include reducing the number of court hearings per case by 44 percent, reducing staff time per case by 45 percent, and reducing time to disposition by 58 percent. Utah is allowing other state courts to use the source code underlying their platform on a shared basis.

In 2020, Innovation for Justice (University of Arizona) published a usability evaluation and report recommending improvements to better align the platform with the needs of its users.[2] The improvements now being addressed by the Utah ODR platform include the following:

- Ease the transition from paper to platform.
- Streamline the registration process.
- Simplify document sharing and review.
- Improve ODR information and help.
- Clarify legal information and user options.

In December 2020, the National Center for State Courts published a final report on the impact of the Utah ODR pilot program.[3] The report concluded that there was a significant reduction of cases that required more than one hearing to fully resolve, and the average time to disposition decreased by five weeks or more. Additionally, use of the program took place outside normal court hours and from geographic locations outside courthouse areas.

Michigan—MI Resolve

Michigan launched MI Resolve, their statewide ODR program, in July 2020. MI Resolve uses a commercial vendor and is administered by mediation centers statewide. The focus of this ODR program is financial disputes in rentals, roommates, nonmarital dissolution of property, and contract cancellation. Prior to implementing, Michigan

[2] Stacy Butler et al., *The Utah Online Dispute Resolution Platform: A Usability Evaluation and Report* (Sept. 8, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696105.

[3] Paula Hannaford-Agor et al., *Impact of the Utah Online Dispute Resolution (ODR) Pilot Program: Final Report* (National Center for State Courts, Dec. 10, 2020), www.ncsc.org/__data/assets/pdf_file/0025/57823/NCSC-UT-final-2020.pdf.

committed to a data-driven, transparent approach, establishing baseline metrics and using data and lessons learned to make continual improvements. MI Resolve is free to litigants. Similar to Utah, this is an "opt-out" program with all disputes being funneled into the ODR platform.

MI Resolve can be used both pre-filing and post-filing, allowing plaintiffs and defendants to negotiate online for seven days prior to the filing. Once a case is filed, a volunteer mediator assists the parties from the outset.

Challenges of note include involving defendants in the ODR process. Like Utah, Michigan sees marketing as one of the solutions to this challenge.

New Hampshire and Alaska—Challenges

Lessons learned from jurisdictions struggling to launch a program can be of tremendous assistance. Both New Hampshire and Alaska shared the struggles and pitfalls that caused their implementations to be delayed multiple years. In addition to months dedicated to planning and additional months spent meeting with vendors and negotiating master service agreements, some common threads and recommendations emerged around planning for ODR:

- *Purpose.* Be clear about your purpose and the problem you are trying to solve.
- *Metrics.* Be clear about baseline metrics before you begin your program.
- *Champion.* Have at least one champion inside the court with some visibility.
- *Stakeholders.* Make sure to involve your stakeholders. They do not want to be left out. You want to hear about their concerns early.
- *Users.* Design with user friendliness in mind. Know your audience.

The California Experience

Superior Court of Los Angeles County

In February 2021, the Superior Court of Los Angeles County launched an online dispute resolution platform for small claims cases to assist litigants in resolving their cases efficiently and without having to come to court.[4] In May 2021, the Los Angeles court will launch an ODR platform in unlawful detainer cases. To increase court efficiency, to make it easier and less costly for litigants to handle these cases, and to increase the use of mediation, the court has partnered with the County of Los Angeles and has contracted

[4] Superior Court of Los Angeles County, "Presiding Judge Eric C. Taylor Announces New Free Online Dispute Resolution Services for Small Claims Litigants," news release February 18, 2021, *www.lacourt.org/newsmedia/uploads/1420212181526321NRSmallClaimsODR.pdf*.

with TurboCourt to build an online dispute resolution platform, LA-ODR, for both small claims and unlawful detainer cases.

LA-ODR guides litigants through a series of simple questions regarding their dispute. LA-ODR enables litigants to confidentially share documents, propose a resolution, and document the terms of the resolution in a written settlement agreement without a court hearing. LA-ODR also enables litigants to be assisted by trained mediators and receive information about available services from housing counselors during the negotiation process. Once a resolution is reached by the parties, LA-ODR generates the forms for a settlement agreement and then automatically and electronically files the final agreement with the court at no cost. Parties who do not reach an agreement within two court days of their scheduled court hearing will be required to appear in court (either in person or remotely). Given the significant number of litigants who registered for ODR in small claims cases the first week it was implemented, there is no question that LA-ODR will enable litigants to settle easily and successfully the approximately 40,000 small claims cases and more than 60,000 unlawful detainer cases filed annually in the Los Angeles court.

Superior Court of Santa Clara County
The Superior Court of Santa Clara County has a small claims ODR program leveraging the commercial ODR platform Modria. Participants in an active small claims case with only one plaintiff and one defendant over a dispute only about money are eligible to participate. Use of the small claims ODR program is free to the plaintiff and defendant, and volunteer mediators are available to facilitate resolution.

Participation is voluntary. To participate, a party must provide their email address to the court at least 20 days before the scheduled hearing. Once the court receives both parties' email addresses, the case is automatically forwarded to the ODR program.

The overall implementation has not been as successful as the court would like. Likely contributing factors are that it is on a request basis in which both parties have to agree, and the requester is required to know the other participant's email address. If both email addresses are not known by a requesting party, each party needs to request ODR independently.

Superior Court of San Joaquin County
While not fitting completely within the workstream's definition of ODR (as the program does not resolve a dispute between "parties"), the Superior Court of San Joaquin County launched a traffic ODR program in October 2020. The goal was to reduce the number of court users coming into the courthouse and to relieve the walk-in traffic arraignment calendar. Modria is the commercial ODR platform used in the San Joaquin court. Traffic offenders can register to submit a request to resolve their citations. It is an opt-in program. Requests may be made for simple actions including fine reduction, lifting a

license hold, or to show proof of correction. Users of this ODR solution are charged a fee for participation.

Information regarding accessing ODR to resolve traffic matters is posted on the court website and provided by the court in courtesy notices sent out to traffic offenders. The program has been in place for five months (October 2020 through February 2021). To date, over 2,000 people have participated, with 1,885 matters resolved. The court has noticed an increase in users, with approximately 70 new users weekly.

Superior Court of Yolo County
The Superior Court of Yolo County launched their ODR program using the Modria platform in October 2019 for small claims cases.[5] After registration, the plaintiff starts the ODR process by making an offer to the defendant on the amount the plaintiff is willing to accept to settle the case prior to trial. The defendant can then agree or provide a counteroffer. After two weeks, if the parties are not able to reach agreement on their own, either party can request the online help of a trained mediator.

If an agreement is reached, a written agreement is prepared and emailed to both parties for signature, and once signed is automatically filed with the court. If the parties are not able to reach an agreement after 45 days, the ODR process ends and the case moves forward to trial.

A one-time fee of $25 is charged to the plaintiff if the defendant agrees to use ODR. The fee includes the use of an online mediator, and the parties can agree to split the cost or the defendant can agree to reimburse the plaintiff.

Program participation to date has been low. As of the end of January 2021, there were 346 registered users and 12 disputes in total in which both the plaintiff and defendant participated, with zero agreements resolved through ODR.

Literature Review

Current attention and recent movements by courts to engage with ODR implementations have resulted in a number of articles in this arena. A link to resources is included in Appendix C.

5.0 WORKSTREAM RECOMMENDATIONS

Recommendation 1: Master Service Agreements

Publish a request for proposal and select vendors for branchwide master service agreements (MSAs). A number of commercial vendors are involved in delivering ODR

[5] Superior Court of Yolo County, "Online Dispute Resolution," www.yolo.courts.ca.gov/divisions/small-claims/modria-faqs.

solutions for use by courts. Many of these commercial solutions have already been deployed in various jurisdictions. Significant time and energy can be saved by individual courts when MSAs are available for use by judicial branch entities. Preapproved MSAs would allow pilot and early adopter courts to move forward with ODR on a timely basis and meet the needs of customers when that need is most vital.

Recommendation 2: Funding for Pilots

Courts must identify funding opportunities that best support the development and implementation of ODR, taking into account their particular needs and resources. After the scope of the ODR project is determined, courts should evaluate the different funding opportunities available to best meet that scope. Funding sources can include a budget change proposal, grants, fees charged to litigants, and/or partnership ventures that enable courts to pilot ODR projects.

A court should consider both its short-term and long-term funding goals for the ODR project. Short-term goals could include immediate costs such as building out an in-house ODR program, similar to Utah's and Connecticut's ODR platforms. ODR projects can also be limited in term or scope, addressing a specific issue such as a particular backlog that once resolved would not require long-term funding. On the other hand, courts must develop long-term funding goals for a comprehensive ODR program, which requires a sustainable funding strategy for ODR improvements and ongoing administrative costs. These considerations will influence whether a court seeks out funding on a one-time/limited basis, an ongoing funding stream, or some combination of the two.

Budget change proposals

Courts may advocate to have the Judicial Council's Trial Court Budget Advisory Committee adopt a budget change proposal (BCP) to support ODR pilot projects. A BCP is a formal document that is required when an agency has a need for additional resources or would like to propose new program activities not currently authorized under the state budget. The advisory committee can direct staff from the Judicial Council to draw up BCPs to submit to the state Department of Finance. Recommendations for the coming fiscal year and budget proposals for future fiscal years go before the Judicial Council in a business meeting open to the public. The council makes allocations and sets priorities for the branch.

For example, it might be of interest to the Legislature to fund ODR in traffic cases because of its positive correlation with public safety and increased efficiency of traffic administration. The courts can lobby the advisory committee to request a BCP earmarked to fund a traffic ODR program that informally resolves traffic infractions, similar to Connecticut's traffic Online Ticket Review Program, thus avoiding the complex failure-to-pay or failure-to-appear civil assessment process.

Many of the case types suitable for ODR include matters involving a high volume of self-represented litigants. Thus, a BCP could also be submitted to provide additional funding to self-help centers specifically targeted at enhancing self-help services by adding ODR to its menu.

BCPs provide sustainable funding for an ODR project on a long-term, statewide basis, unlike grant funding, which is often offered on a limited basis. However, a BCP is a much longer funding process than most other funding mechanisms described herein. The BCP must percolate through different judicial and legislative committees before being approved.

BCPs also face many competing interests among various court needs and must be deemed a priority over other important judicial branch initiatives such as funding for capital cases, self-help centers, and courthouse construction and maintenance.

Grants

Grants can be another option for funding an ODR pilot project. The grants available to courts will depend on the project purpose and the identity of the funder. Grant funding is often tailored to a specific purpose, such as technology-related grants or self-help services, or a particular case type, such as family law, unlawful detainer, and the like. Courts can be limited by the grant funder, particularly if grant funding comes from a private entity, as issues of conflict of interest can easily arise.

- **Modernization funding.** The grant opportunities regularly offered by the Judicial Council promote court innovations and efficiency, and thus are a good match for an ODR project. A court should carefully consider if an available grant is well-suited to its contemplated ODR project. For example, the Judicial Council awarded $25 million in modernization funding to trial courts in fiscal year 2020–21 for the modernization of trial court operations through the use of technology. Modernization funding is specific to 13 listed categories of court technology enhancements but does not specifically include ODR. A trial court might be able to avail itself of modernization funds by integrating one of the 13 modernization fund categories into its ODR project, such as live chat or digital evidence exchange, to qualify for full or partial funding of an ODR pilot.

- **Model Self-Help Pilot Program.** The Model Self-Help Pilot Program is another example of a Judicial Council grant opportunity available to support programs like ODR. The model self-help funding was provided to encourage courts to use technology to expand their self-help services.

- **Court Innovations Grant Program.** Similarly, the Judicial Council has offered Court Innovations Grant Program funding in years past for trial courts to use in the establishment, operation, administration, and staffing of programs and practices that promote innovations, modernization, and efficiency. Although

these grants have or will terminate in fiscal year 2020–21, similar funding may be available in future years and may be appropriate depending on the court's targeted ODR consumers and the timing of ODR implementation.

While grant funding opportunities are frequently available, there are some limitations. First, courts must actively keep track of the latest grant funding opportunities through the Judicial Council in order to find matching funds to support an ODR pilot project. Second, the pilot project timelines must also fall within the parameters of available grants. Finally, grant funding is typically limited to a one-time or limited-term basis.

Party fees

A court may choose to have litigants bear the cost of ODR, but must carefully consider the limitations of charging these fees. Passing the fees on to litigants will provide the court with a consistent funding stream. Courts would not be burdened with the task of constantly seeking out funding or shouldering the cost of ODR in a party-pay ODR system. However, such fees can be prohibitive to ODR participation. Litigants may be discouraged from participating in ODR if they have to pay a fee because they cannot afford the costs and/or do not wish to pay a fee.

Courts are typically limited in the additional fees they are able to charge outside of the Uniform Civil Fee Schedule. Courts are also precluded from adopting local rules charging additional fees for conciliation and mediation in family law matters. (*Hogoboom v. Superior Court* (1996) 51 Cal.App.4th 653, 668.)

Even *if* courts can legally mandate ODR prior to a hearing or trial, and choose to do so, the court will need to create a process for fee waivers or exemptions if the parties are charged an ODR fee. Alternatively, if courts cannot legally mandate ODR because a fee is charged to litigants, the court will need to consider whether voluntary ODR will result in adequate participation numbers. Voluntary or opt-in ODR programs have experienced lower participation and success rates.

Community partnerships

Funding opportunities may also be available through partnerships with various local and community agencies. The court should explore whether funding would be available if it collaborated with mediation organizations, law enforcement agencies, county or government groups, or other community justice partners. Leveraging these partnerships may not only lead to other funding sources, but also additional resources, such as the manpower to support the program.

Each year, 10 percent of California's Equal Access Fund allocation is distributed by the Legal Services Trust Fund Commission as Partnership Grants. This funding is available for joint projects of courts and qualified legal services agencies to enable the legal services agency to provide self-help services at or near the courthouse. A court may wish to

leverage a Partnership Grant to offer ODR to litigants via a collaboration with a local legal service agency that offers ODR as part of its self-help services.

Similarly, a court can partner with a local mediation organization to retain mediators for its ODR program. The Dispute Resolution Programs Act of 1986 (DRPA) provides funding to court and local mediation organizations to offer dispute resolution services to its county residents. Courts may want to utilize the mediators from DPRA-funded programs to support an ODR pilot project. Courts may choose to have a DRPA-funded program directly administer the ODR program. For example, Michigan's MI-Resolve ODR program is controlled by the Michigan mediation center through a collaboration between the center and the court to offer ODR statewide.

Metrics impact funding

Grant funding and future BCPs are dependent upon a showing of success both individually as a court and statewide as a judicial branch. Therefore, special attention should be given to developing metrics that directly track the success of the project based on the criteria of the ODR funding source. In this sense, it is equally important to track data and milestones that meet both the court's goals in creating the project as well as the funders' goal in promoting a specific initiative.

Recommendation 3: Information Sharing

Using ODR technology to deliver court services to the public is still an emerging technology. As with any new technology or process, having a process in place for sharing information regarding experiences with implementation, pitfalls and challenges, and best practices can assist other courts.

ODR technology is new, not only to courts, but also to users. It is vital that we as a branch share and understand what other courts are seeing and experiencing regarding

- customers transitioning from paper to electronic;
- ease of use of the technology;
- user/customer engagement;
- public notification/marketing;
- metrics related to time to disposition/drop-off rates/resolution rates/customer engagement;
- customer satisfaction
- access to justice; and
- areas for improvement.

Early adopter and pilot courts should gather information related to their implementations, rollouts, customer engagement, and other results to make it easier to share their experiences. A collaboration presenting results of these projects should be shared, and the projects should be replicable.

Recommendation 4: Buy vs. Build

In the modern virtual court, software that facilitates remote resolution of cases is a critical component to the overall end user experience and necessary to support the digital and virtual interactions that our constituents have come to expect. It is also critical to the overall efficiency necessary to perform the work of the court within the funding limitations that we have. Online dispute resolution systems provide both an experience that our constituents have come to expect (online/virtual/remote access) and empower local courts and the branch to leverage technology to free up their finite labor resources for other, high-order work.

When it comes to software solutions, it can be quite difficult to decide whether to choose the flexibility of building customized software or the speed of buying a tried-and-tested third-party vendor solution. The difficulty of this decision can be compounded when the market for a given solution is new or underserved. ODR for courts is a relatively new market with a limited number of vendors, which adds to the challenge of this decision.

Through the course of this workstream, we have been able to review the solutions offered by the established vendors in the ODR market sector. It is clear from our review that the products appear to have quite a bit of maturing remaining before they can support most courts well, out of the box. We have seen that it is typical of ODR implementations to take months and a lot of custom programming to meet the needs of an individual court. This is likely due to the diverse business and process needs of different courts, but it is also because the ODR products available on the market appear to lack enough maturity to meet the needs of courts out of the box.

In a market such as ODR for courts, a custom solution and a commercial off-the-shelf solution can have more in common than might normally be expected. The following is a list of considerations that each court should explore before deciding to build or buy an ODR solution.

Considerations when building an ODR solution

- **Control, customization, and fit.** One of the greatest benefits of building a custom ODR solution is that it can be developed to meet a court's or the judicial branch's exact needs. It will be tailored to the way a court or the branch does business and will interact with the end user exactly as the court or the branch has defined. An added benefit is that a court or the branch could enhance the solution or change it as needed on their timeline, not the vendor's. The ODR solution would be able to change rapidly along with the growing needs of the court or the branch.

- **Guaranteed integration.** Building a court- or branch-owned solution ensures seamless integration with any existing software, tools, and processes that are

already in place, increasing the likelihood that the user experience is strong and efficiencies are gained.

- **Ownership/long-term cost control.** While off-the-shelf software may be cheaper to buy initially, over time their costs can grow significantly. Subscriptions and licenses tend to be time-limited, so courts or the branch will have to reinvest whenever they expire. If the court's or the branch's volume grows, any vendor subscription or licensing fees would likely increase. If a court or the branch were to develop a solution, the costs would be more stable. If the branch were to develop a custom ODR solution that was available to all California trial courts, that would significantly lower the total cost of ownership across the branch and likely make a custom solution cheaper than a vendor solution.

Considerations when buying an off-the-shelf ODR solution

- **Lower upfront cost.** The initial cost of an off-the-shelf product should be lower than a custom-built solution because much of the software is already written. However, this analysis changes significantly if the cost is analyzed against all 58 California trial courts potentially purchasing an ODR solution. This economy of scale would likely change the analysis, such that it would be significantly cheaper to build a custom solution if the solution could be used branchwide.

- **Less time to implement.** It takes time to identify an organization's workflow processes and develop the solutions around them. This can take months and sometimes years. In a normal mature market, this can be one of the biggest limitations to developing a custom solution. However, because ODR for courts is a relatively new market with less-mature products, implementation time frames for vendor solutions are longer than normal.

- **Updates, new features, and ongoing maintenance.** ODR vendors will want to stay competitive and keep up with maintenance. A vendor solution will often be updated regularly with new features and functionality. However, given the level of customization in current vendor ODR implementations, it is unclear how well this typical benefit would play out in this market.

There are a lot of factors to consider when deciding to build a custom ODR solution or purchase from an existing ODR vendor. If a court decides to go with a third-party solution, they should take the time to weigh the different vendors and solutions available. If a court or the branch should choose to build a custom ODR platform, they will need to recognize the time, effort, and costs it will incur, along with the long-term benefits.

Recommendation 5: Key Considerations

Courts adopting ODR technologies should take into account several considerations prior to implementation.

Clearly identify and measure the problem to be addressed by ODR. Perhaps the most important first step in developing and implementing change or innovation in any setting is to clearly identify the problem the innovation or change is intended to address. ODR is no exception. For example, will ODR reduce the time to resolution in a particular case type, reduce failures to appear or defaults, reduce backlog/caseload, reduce staff time, provide parties with a mediator, and/or increase access to courts and justice?

Clearly identify how ODR will address the problem identified. Once a court identifies what the problem is that ODR is intended to address, a court must articulate how ODR will address it. For example, if the issue is to reduce the time to hearing in small claims or unlawful detainer actions, how will an ODR platform achieve that goal? Or, if the goal is to provide parties with the opportunity to resolve their case with the assistance of a mediator, how will the ODR platform provide access to a mediator?

Determine how the development, implementation, and administration of the ODR platform will be funded. A court must clearly identify funding resources for the development, implementation, and administration of any technology innovation. A court will need to determine whether it has the resources to effectively implement an ODR platform and whether any additional funding will need to be obtained by grants, charging a fee, partnering with local agencies or governments, or the like. The funding issue will necessarily impact other project considerations, such as whether a fee can be charged, what impact a fee would have on participation, and whether funding resources are ongoing or available only on a one-time or limited basis.

Determine whether participation in the ODR process will be mandatory or voluntary. Related to the issue of funding is whether litigants will be required to participate in the ODR process. The answer to this question may depend on whether applicable law allows a court to require litigants to participate in ODR and, if so, whether there will be a cost associated with participation. If there is a cost, a court must determine who will bear the cost—the court, the litigant, or some other funding source (e.g., grants). If a court mandates participation in ODR, a court must decide whether the platform will require participants to opt out or opt in.

Determine the optimal timing for participation in ODR. A court must determine the ideal timing for participation in ODR depending on the case type, the goal of the ODR participation, and whether participation is mandatory or optional. In some case types, an attempt to resolve the case before the case is filed may be ideal. In other case types, the optimal time for ODR may be post-filing but a certain number of days before the trial or first appearance. A court will also need to consider what applicable law allows.

Consider the necessary partners and stakeholders for ensuring the success of ODR. Depending on the goal of the ODR platform and case type, it may be necessary for a court to partner with or, at the very least, secure "buy-in" from law enforcement agencies, county partners, mediation service providers, or other stakeholders. For example, if ODR is offered or required in traffic matters, a court will need to determine whether law enforcement and agencies issuing traffic citations are supportive of ODR and, if so, whether the agencies need access to the platform or to the court's case management system in order for the ODR program to function in an efficient and timely fashion. If a court's ODR platform is dependent on the participation of outside mediators, consideration must be given to how the mediators will be identified and participate. Opportunities abound for strategic partnerships in furtherance of ODR, for funding, and for increasing access to justice.

Develop a plan for notification and publication of the availability of ODR and how it can be accessed. A court should include in the development and funding of an ODR program a plan to notify litigants and participants of the availability of ODR and, if applicable, of the requirement to participate in ODR. It will be imperative to the success of any ODR program that litigants participate. It follows that participation will depend on adequate and timely notice of and information about ODR to litigants. Courts will need to think about the languages in which notices need to be provided and the methods of distribution (e.g., inclusion in a minute order or citation, posted on a website, posted in courthouses, communicated to and through legal services organizations).

Consider access, training, and support issues. In developing ODR, consideration must be given to whether it will be accessible to litigants who may not have easy access to a device, the internet, or Wi-Fi/broadband, among other technological limitations. It may be necessary to provide access to devices or connections (e.g., making tablets/computers available in courthouses, in public libraries, or other public spaces). In addition, if litigants are able to access the ODR platform, it is likely some will need assistance with navigating the platform. Courts should consider the need for technology support (e.g., a help desk) or "navigators" within the platform should a participant need assistance proceeding to the next step, for example.

Consider integration with case management and electronic filing systems. Courts should consider whether an ODR platform will be integrated with existing case management and electronic filing systems or will have the flexibility to be integrated in the future. If a court determines that a factor key to the success of ODR is the ability for users to file a settlement agreement via the ODR platform, consideration must be given to the logistics of integration with existing court technology systems and related fees, if any. Similarly, if monetary payments are essential to the ODR process, integration with the court's financial systems will be necessary, which is often a complicating factor.

Develop metrics and a strategy to measure usage and the success of the ODR platform. A court should develop effective and informative data strategy and measurement tools. The identification of clear goals to be achieved by the ODR platform will assist in developing ways in which to measure whether and how those goals are being achieved. For example, if the goal is to reduce the number of defaults or failures to appear, the data strategy should include measuring these metrics during the time periods before and after implementation. If the goal is to reduce the time from filing to resolution, metrics should be designed to measure this variable. If a court determines that the goals of ODR are not being achieved, a court should have some flexibility within the platform to determine the source of the problem. For example, if the usage rate is high but the resolution rate is low, the platform should enable a court to track trends and patterns of usage to determine whether there is a particular point at which a user tends to abandon the process. Data collection should be transparent, accessible, and malleable.

Recommendation 6: Metrics and Measurements

As mentioned above, before any ODR implementation, it is important to identify desired goals and priorities and forecast the feasibility of reaching those goals. Upon implementation, measuring progress toward goals in real time—by reading computer database reports and users' feedback or satisfaction surveys—will help in deciding whether sufficient time has passed for gathering meaningful information and evaluating whether to continue or improve the ODR program.

Why measure?

Court officials might want to predict achievable goals and measure past achievements to

- decide whether investing time and funding into an ODR program would be desirable;
- convince others handling funding sources that an ODR program is worthwhile;
- determine whether proceeding with an existing ODR program is desirable;
- determine whether an additional phase of an ODR program is desirable (e.g., adding case types); or
- tweak the ODR program to improve success.

Measuring achievements

There are various possible gains that court officials might consider important to measure, with priorities varying with each jurisdiction.

Success can be measured according to the extent to which ODR serves broader public policies. ODR programs can help serve such broader goals by enabling remote access toward resolving court cases while minimizing in-person contact. In California, two such

fundamental policies are to increase the public's remote access to the courts and to combat the COVID-19 pandemic by minimizing physical contact. Specifically, the Judicial Council's Legislation Committee recently recommended legislation "to expand access by increasing the ability of court users to conduct branch business online."[6] Also, recent California budget provisions recognize a need for providing funding to handle pandemic-related expenditures, including "using technology to conduct proceedings remotely."[7]

Measurements more specific to ODR goals include these potential public gains:

- Increased access to justice and fairness by enabling alternatives for case resolution;
- More economical and potentially speedier resolution of cases as compared with conventional dispute resolution involving court appearances;
- Increased convenience for litigants via time-efficient and flexible services;
- More flexibility to work out solutions that litigants would mutually prefer;
- Less stress as compared to court appearances;
- More supportive of self-represented litigant participation, for those litigants fearful of or unprepared for court appearances;
- Less road congestion due to less traveling required by participants; and
- Lower risk of exposure to COVID-19.

Gains available to courts include:

- A tool for management of existing budget limitations or new reductions;
- Reduced expenses (fewer in-person court visits mean less building and parking maintenance or new construction required);
- Reduced need for human resources management (staffing needs or workloads reduced by online case handling instead of in-court involvement);
- Quicker case dispositions and reduced caseloads;
- Increased fine collection by encouraging participation; and
- A tool for moving cases forward despite the pandemic, during which in-court processes are not fully operational.

[6] Judicial Council of Cal., Legislation Com. Rep., *Judicial Council: 2021 Legislative Priorities* (Dec. 21, 2020), p. 1, *https://jcc.legistar.com/View.ashx?M=F&ID=9036761&GUID=7E70CE9B-FA9C-45B2-B5C0-674D87F7A556*.

[7] California Dept. of Finance, *Governor's Budget Summary—2021–22*, "Judicial Branch" (Jan. 8, 2021), p. 168, *www.ebudget.ca.gov/2021-22/pdf/BudgetSummary/JudicialBranch.pdf*.

When to measure

Before an ODR system is in place, only forecasts as to the expected benefits for selected periods of time are possible. The experiences of other courts in the nation that have implemented ODR programs can be drawn upon to forecast as soundly as possible.

With an ODR program in place, evaluating the disposition of cases or other matters can be accomplished in real time, with the application saving and reporting data on an ongoing basis. The saved data could include:

- ODR resolutions that averted potentially filed cases;
- Numbers of filed cases resolved;
- Instances of reduced in-person interactions; and
- Time to resolution as compared to time for cases otherwise disposed of.

For measuring user satisfaction, the saved data could include any transmitted feedback or completed surveys.

Metrics duration

If the number of ODR resolutions falls short of goals, then continuing to measure over a longer time interval (more months or even years) may be desirable. Drawing litigants to successfully use the new application will take some time. In their presentations to the committee, some courts indicated present lackluster results, but they still hoped for future improvement and were not then abandoning ODR. Metrics might be continued indefinitely to monitor the need for changes or cessation.

Factors affecting measured results

The achievement of desired goals can be affected by various and perhaps adjustable factors, including:

- Whether funding decisionmakers will support or hinder development.
- Whether very experienced private businesses (e.g., TurboCourt), startup businesses, or public employees are selected to create the computer applications.
- Whether a higher price is paid for faster computer programming. A larger private business that made a presentation to the workstream stated that three months until the rollout of an application was possible.
- Whether litigants are charged to use the application or it is offered free of charge (temporarily or permanently), to encourage use. Some courts' presentations indicated that they opted to fund the new computer system, at least initially, to encourage use.
- Whether the user interface is intuitive or difficult to understand and to navigate.

- Whether tutorials or live help are available to guide users unfamiliar with the system.
- Whether the court implements and enforces mandated use of ODR or makes it optional.
- Whether advertising about the availability of ODR is broadly disseminated.
- Whether any involved officers, employees, or volunteers, such as mediators, are supportive of ODR and cooperative.
- Whether a general societal trend toward online business interactions continues to increase, such that using ODR is popular, or that people prefer in-person interactions.

6.0 RULE AND STATUTORY CONSIDERATIONS

The workstream was also tasked with identifying rules or statutes that may need to be amended to facilitate the ability of courts to implement ODR locally. A workstream track was established to specifically consider any legal obstacles that may need to be addressed to facilitate ODR programs. While there are general considerations applicable to many case types, some case types have unique needs and legal frameworks. Consequently, additional implementation recommendations are provided for specific case types.

Recognizing that ODR is unlikely to be a "one-size-fits-all" approach, the workstream favored minimizing legislative and rule changes wherever possible. While the workstream has generally not made an attempt to draft specific language, it has attempted to provide sufficient detail to convey the goal of the rule or legislative changes to facilitate the work of future committees.

General Considerations

Authority to Compel ODR

The workstream's research indicates that in a successful ODR program, the ability to mandate participation in ODR is a key driver for user participation. Programs that default to participation in ODR (with the ability for court users to opt out) result in higher participation and engagement rates than programs where users must take an affirmative step to opt in.

Generally, no legal authority authorizes courts to compel parties to participate in ODR. Under California law, mediation usually must be voluntary. (See, e.g., Cal. Rules of Court, rule 3.853 [mediations to be conducted in a manner supporting principles of voluntary participation and self-determination by the parties, including the right to withdraw from mediation at any time]; see also *Travelers Cas & Sur. Co. v. Superior Court* (2005) 126

Cal.App.4th 1131, 1139–1140; *Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, 1103.)

An opt-out ODR system might be considered coercive or mandatory, particularly without legal authority for such a system. Court-ordered mediation has been more enforceable than privately opted mediation. A court did not abuse its discretion in imposing monetary sanctions against parties and an attorney for their unexcused failure to participate in a court-ordered mediation, without good cause, in violation of rule 12.15 of the Local Rules of the Superior Court of the County of Los Angeles, and California Rules of Court, rule 3.894(a). (*Ellerbee v. County of Los Angeles* (2010) 187 Cal.App.4th 1206, 1216–1217, citing Code Civ. Proc., § 575.2(a); Cal. Rules of Court, rule 2.30(b); and Super. Ct. L.A. County, Local Rules, rule 7.13 (renumbered 3.10).)

Courts lack authority to impose sanctions based on a party's failure to attend *private* mediation because it is voluntary by definition. (*Jeld-Wen, Inc. v. Superior Court* (2007) 146 Cal.App.4th 536, 543.)

ODR also has the potential to facilitate resolution of disputes prior to filing. However, courts cannot currently mandate that parties attempt ODR prior to filing. Considerations for pre-filing ODR, if such a program were implemented, would likely need to include legal authority to implement such a program, and sensitivity to statutes of limitations to avoid the possibility that people inadvertently waive their rights by failing to file within the relevant statute of limitations for their particular case type.

Costs

Another possible impediment to mandating ODR could be the cost of such programs. While ODR programs are not necessarily fee-based, depending on the implementation they may carry financial costs to administer the system (e.g., usage/transaction fees charged by vendors, more staffing) that have to be absorbed by the implementing court or passed on to litigants. Passing on the costs to litigants is a particularly sensitive issue for ODR programs, which focus on high-volume case types with self-represented litigants who frequently have limited means. California law generally limits a court's ability to order parties into fee-based alternative dispute resolution services. (See, e.g., *Jeld-Wen Inc. v. Superior Court* (2007) 146 Cal.App.4th 536, 543 ["The essence of mediation is its voluntariness"]; *Kirschenman v. Superior Court* (1994) 30 Cal.App.34th 832, 834 [because mediation is voluntary, party could not be sanctioned for failing to attend or coerced to attend further mediation sessions].) If courts were to pay the costs of ODR, the financial impediment to litigants would be eliminated, but it would create an obstacle for court implementation. Even if a source for the ODR program will not expect compensation (e.g., Utah's ODR program has been offered free of charge by that court), there are significant administrative costs in administering such a program. The Superior Court of Orange County has estimated that to run an ODR program for small claims would require an administrative staff person working full time. Therefore, a funding source for ODR should be identified.

The comprehensive statutory scheme regarding the imposition of fees and costs in family law matters precludes a superior court from adopting local rules requiring additional fees for conciliation and mediation. (*Hogoboom v. Superior Court* (1996) 51 Cal.App.4th 653, 668.) The rationale for this decision likely means that rules of court could not be adopted to require parties to pay fees or costs for mediation in family law or unlawful detainer cases. Therefore, if the parties are to be charged a fee or cost for ODR, the workstream recommends that a statute authorize the fee or cost.

The mediators and arbitrators for court-connected arbitration or mediation are paid by the court, not the parties. (Code Civ. Proc., §§ 1141.28(a), 1775.8(a).) For voluntary civil mediation, a mediator must disclose to the parties in writing any fees or costs to be paid before commencement of the mediation. (Cal. Rules of Court, rule 3.859(b) and Adv. Com. comment.)

Electronic Signature Requirements

To the extent that parties successfully reach resolution through ODR, both Family Code section 3186(b) and Code of Civil Procedure section 664.6 require a written settlement agreement to be signed by the parties in order to be enforceable. Both Code of Civil Procedure section 1010.6 and rule 2.257 of the California Rules of Court have recently been amended to permit electronic signatures on documents filed in court. However, the requirements for electronic signatures when a party is submitting the signature of an opposing party can be onerous and not amenable to an ODR schema. For example, rule 2.257(c)(2)(A) requires that the filing party obtain and maintain possession of an original document physically signed by all parties, which poses challenges to an ODR process that seeks agreement through electronic means. Rule 2.257(c)(2)(B) does permit a full electronic signature, but sets forth several requirements, including that the validity of the electronic signature be linked to the document in such a way that if the underlying document is changed, the electronic signature is invalidated.

These electronic signature requirements may pose challenges for executing settlement agreements reached through ODR. A rule could be amended or a statute could be enacted to make it easier to execute and enforce electronically signed settlement agreements reached through ODR, for example: “When online dispute resolution results in a settlement, the settlement agreement may be electronically signed. A settlement agreement signed with an electronic signature during an online dispute resolution session shall be as effective as a settlement agreement with an original signature.”

ODR Mediators

ODR programs that are facilitated through the use of court or volunteer mediators may need rules promulgated to regulate their education, training, and monitoring. California Rules of Court, rule 3.835 et seq. are applicable to court-connected mediation programs for general civil cases. It may be possible to amend those rules to encompass ODR programs or to adjust the requirements of the mediator commensurate with the type of program being implemented. Alternatively, the rules of court regarding mediator

standards of conduct and program guidelines and administration may be used as a model to fashion rules specifically addressing ODR. Some rules of court, particularly those relating to mediator training and experience, allow local courts to set their own standards for their respective panels. Consideration should be given to whether a similar provision regarding local court standards is relevant or appropriate in the context of ODR.

In addition to rules and standards regarding training and competence specifically relating to mediation/dispute resolution, it may also be appropriate to establish rules or standards relating to training and competence with the ODR technology or platform itself. Standards or rules acknowledging the distinction between ODR and face-to-face alternative dispute resolution might also specifically address the unique ethical issues that may arise in the context of ODR. For example, how can a mediator maintain impartiality or the appearance of impartiality when one party needs more assistance than the other regarding the use of the technology? Is there a conflict of interest if a mediator has an ownership interest in the mandated ODR platform being used? And how might a mediator address issues regarding confidentiality in the context of ODR?

Dispute Resolution Programs Act of 1986

Most ODR programs require the services of mediators to facilitate settlements. It is anticipated that such mediators will be either uncompensated or paid by programs such as the Dispute Resolution Programs Act of 1986 (DRPA). DRPA provides authority and structure for the creation, administration, and qualification for use of a fund for alternative dispute resolution programs. This fund is typically managed by either the county or the court. (See, generally, Cal. Code Regs., tit. 16, § 3600 et seq.; Bus. & Prof. Code, § 465 et seq.)

Courts throughout the state currently rely on funding from DRPA to provide some alternate dispute resolution programs to litigants, making it possible that DRPA funding could assist courts in retaining mediators to help facilitate ODR programs.

Using a DPRA-funded organization to facilitate ODR programs may address some of the questions of training requirements raised above, as the statutes governing DRPA set forth very exacting training requirements for fund recipients. (Cal. Code Regs., tit. 16, § 3622.) To the extent additional rules, standards, or guidelines might be implemented specifically relating to ODR, it is important that these ODR-related rules not conflict with DRPA, to avoid both confusion and potential violation of one set of rules for any person or entity to whom both sets of rules or standards apply.

Other sources of mediators include the use of volunteer mediators.

Cases with larger dollar amounts at issue may require a more experienced mediator and justify litigant fees to participate.

Complaint Process

Rules 3.866 through 3.872 of the California Rules of Court set forth parameters for a complaint process relating to court-connected mediations/mediators and require each court with a court-connected mediation program to have its own specific complaint procedure. Consideration should be given to whether ODR programs would fall within these complaint procedures, or whether separate complaint procedures specifically relating to ODR and the ODR process should be created. Interestingly, DRPA does not address complaint procedures for its recipients. As a consequence, creating a complaint process specific to ODR would not cause a possible conflict with DRPA, as cautioned against previously.

Forms

ODR implementations rely heavily on electronic contact mechanisms between the parties and the court. The workstream recommends that forms in case types amenable to the implementation of ODR should be reviewed and updated to collect information at filing necessary to facilitate court-sponsored ODR pilot programs, specifically the email addresses of all parties. California Rules of Court, rule 2.111(a) already mandates that the first page of each paper filed with a court include the email address of the attorney or self-represented party filing it. However not all forms have been updated to conform to this rule. In addition, a clerk cannot reject a paper for filing that does not contain an attorney's or a party's email address. (Cal. Rules of Court, rule 2.118(b).) More importantly, the rule does not by itself allow courts to use that email address for service, so further amendments to rules of court or statutes, particularly Code of Civil Procedure section 1010.6, may be required.

Artificial Intelligence and ODR

The use of technology-assisted algorithms or artificial intelligence (AI) supplements to facilitate ODR are commercially available and in commercial use. While AI cannot be used to adjudicate disputes, it may provide very efficient and useful tools to assist litigants by gathering legal information, exploring options, analyzing the facts to some degree, and creating legal documents, as well as facilitating dialog between litigants. From a technical standpoint, AI is a possible technology to be used in conjunction with ODR. However, the legal and ethical challenges of using artificial intelligence with ODR are beyond the scope of the workstream.

Additional implementation recommendations

Traffic

Criminal/traffic ODR has been implemented with varying success nationally, and traffic ODR programs are supported by commercial vendor solutions. The workstream has been made aware that there are other, separate detailed statewide efforts in this area and defers to those other efforts. For example, the Judicial Council's Traffic Advisory

Committee is independently working on a proposal concerning remote proceedings, depending on whether the Governor's Budget trailer bill is signed into law.[8]

Small Claims

Small claims is a case type particularly amenable to resolution facilitated by ODR and resolution out of court. Utah's small claims ODR pilot program[9] mandates that parties first participate in ODR before the court will provide a trial date. Cases can be disposed or dismissed through the ODR process for lack of participation. A similar small claims ODR implementation in California would be constrained by several statutes unique to small claims that should be reevaluated, to provide flexibility to courts adopting small claims ODR.

In California, defendants are not required to answer or appear until the date of their small claims trial. As a result, ODR programs initiated by the court may be constrained, in that there is no reliable way to electronically contact the defendant beyond information that may be known to and provided by the plaintiff at filing. A workaround would be to enact statutes that require a plaintiff serve not only the summons, but also provide mandatory ODR information to the defendant at the time of service.

Code of Civil Procedure section 116.330 requires that the clerk's office schedule the case for hearing at the time the case is filed. This limits the court's ability to force parties to participate in ODR as a precondition of getting a trial date. While voluntary ODR is still an option, voluntary ("opt-in") ODR programs have lower participation and success rates.

Code of Civil Procedure section 116.520 requires that the plaintiff still prove their claim even when the defendant fails to appear (i.e., default prove-up). This hampers the implementation of small claims ODR schemes similar to Utah's, in which judicial resources are conserved from cases being defaulted and disposed in ODR for nonparticipation.

Unlawful Detainer

Compelling ODR prior to the filing of an unlawful detainer action would require a statutory amendment. The Legislature has occupied this field: there is a comprehensive statutory framework addressing unlawful detainers and actions required of a property owner for obtaining possession of real property. (See Code Civ. Proc., § 1161 et seq.)

Code of Civil Procedure section 1161 itself sets out the time frame for notices demanding a tenant take actions (e.g., pay rent, comply with conditions in a rental agreement, etc.) or quit, all of which are quite short, normally three or five days. Once that time has passed, if the tenant has not complied with the demand, a landlord may

[8] See *https://esd.dof.ca.gov/trailer-bill/public/trailerBill/pdf/298* (as of Feb. 2, 2021).

[9] Utah Courts, "Online Dispute Resolution (ODR) Pilot Project," *www.utcourts.gov/smallclaimsodr/*.

file a complaint. Code of Civil Procedure section 1166 prescribes the content of an unlawful detainer (UD) complaint and mandates that, upon the filing of a UD complaint, the court shall issue a summons. In light of this statutory scheme, any rule of court prohibiting the filing of such a complaint or issuance of a summons until after mediation has occurred is likely inconsistent with statute.

Compelling ODR before a trial can be set in a UD action is also likely to require statutory amendment unless the ODR can occur very quickly. Currently, the statute requires that, once a defendant has answered and plaintiff has requested a trial date, the court must set the matter for trial within 20 days after such a request. (Code Civ. Proc., § 1170.5(a).) An extension of the date is permitted only if the parties agree or if the court holds a hearing to determine if the plaintiff is likely to prevail and, if so, requires the tenant to deposit rent due with the court. (Code Civ. Proc., § 1170.5(b) & (c).) If a rule of court mandating that a plaintiff take part in ODR before the trial does not fit within the 20-day deadline, it may be determined to be inconsistent with the statute unless in each case the court held the hearing required under Code of Civil Procedure section 1170.5(c), which would diminish any value from the ODR program. Therefore, a statutory amendment may be needed.

Family Law

Existing mandatory mediation (and ODR) laws for custody and visitation
A comprehensive existing statutory scheme addresses court-connected mediation of child custody and visitation disputes. (Fam. Code, § 3160 et seq.; Cal. Rules of Court, rule 5.210.) Nothing in the Family Code prohibits the court-connected mediation of child custody and visitation disputes from being conducted online. Two statutes specifically *authorize* such online mediation if it is feasible and affords due process: Family Code section 3047(c)(2) addresses servicemembers who have been deployed and Family Code section 3012 addresses persons who might be deported or detained by Immigration and Customs Enforcement.

Custody or visitation issues in domestic violence cases are addressed by Family Court Services. (Fam. Code, § 3170(b).) California Rules of Court, rule 5.215 sets forth protocols for Family Court Services' handling of domestic violence cases, including mediation. Additional domestic violence statutes authorize a support person to be present and require meeting with the parties separately. (Fam. Code, §§ 3181, 6303.)

Because nothing in the statutory scheme prohibits online mediation of these cases, no statutory authorization may be required. The Legislature authorized the Judicial Council to implement rules to address court-connected custody and visitation mediation. (Fam. Code, § 3162(a).) Family Code section 3163 requires trial courts to develop local rules to respond to requests for a change of mediators or to general problems relating to mediation, but the statute does not specifically address a trial court's procedures for mediation. To clarify that trial courts are authorized to conduct this mediation online,

the Judicial Council's Rules Committee may want to consider whether to amend California Rules of Court, rule 5.210 to specifically permit the mediation to be conducted online.

Any ODR mediation for court-connected custody and visitation mediation would have to comply with the legal requirements set forth in the authorizing statutes and rules of court.

Statutory authorization likely required for other family law ODR mediation

The mandatory mediation authorized by the Family Code can only address custody and visitation. (See Fam. Code, §§ 3178, 3180.) In order to require mandatory ODR mediation for property division, spousal support, or child support issues, it is likely that authorizing legislation would be required. When mediation or arbitration has been mandated, it has been effected by statutes. (See Fam. Code, § 3160 et seq; Code Civ. Proc., § 1775 et seq (Civil Action Mediation Program); Code Civ. Proc., § 1141.10 et seq. (judicial arbitration).) The California Rules of Court implementing the statutes set forth the details of the programs. (See Cal. Rules of Court, rules 3.891, 5.210, 5.215.) The California Rules of Court "have the force of statute to the extent that they are not inconsistent with legislative enactments and constitutional provisions." (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1011.)

It appears the Legislature intended to occupy the field and bar all rules of court and local rules regarding other types of court-connected mediation programs in family law based on the comprehensive statutory scheme. Court rules have been stricken on the ground they are inconsistent with statute or a rule of court. (See *Hogoboom v. Superior* Court (1996) 51 Cal.App.4th 653, 669; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1351, 1364.) If a detailed procedural or statutory scheme exists, rules of court or local court rules cannot interfere with the parties' rights or violate any procedural requirement set forth by statute. (*Lokeijak v. City of Irvine* (1998) 65 Cal.App.4th 341, 342; *People v. Hall* (1994) 8 Cal.4th 950, 963.) A rule of court may go beyond the provisions of a related statute only so long as it reasonably furthers the statutory purpose. (*Butterfield v. Butterfield* (1934) 1 Cal.2d 227, 228; *In re Marriage of Woolsey* (2013) 220 Cal.App.4th 881, 896.)

If parties voluntarily agree to participate in ODR, no statutory authorization would be required for an opt-in voluntary ODR procedure for family law cases.

Judicial arbitration for property division

One method to provide ODR in family law cases might be to repurpose the judicial arbitration statutes to implement ODR. A court has discretion to order issues involving the character, value, and division of community property worth not more than $50,000 to be submitted to nonbinding judicial arbitration, with the right to trial de novo. (Fam. Code, § 2554(a); Code Civ. Proc., § 1141.10 et seq.) The court may submit the matter to

arbitration at any time it believes the parties are unable to agree on a division of the property. (Fam. Code, § 2554(b).)

7.0 CONCLUSION

The public increasingly expects court services to be delivered remotely. To meet this expectation, and as a result of the impacts of the COVID-19 pandemic, courts are moving quickly to adopt new forms of service delivery. In recent years, following the lead of dispute resolution in commercial arenas, courts have found that court dispute resolution is a service that can be facilitated online through ODR technology. While this is still an emerging technology, courts throughout the country are testing the waters and learning that ODR is an effective way to engage with court users. And, in some cases, court users can complete their court-related needs without the necessity of physically coming to court. The technology has advanced to the extent that numerous commercial vendors are providing ODR solutions and a few state courts have developed their own ODR technology. In California, courts are testing the waters with ODR technology, using commercial vendors to expand into this arena.

As California courts move into the ODR arena, guidance can be helpful to assist courts to more easily and successfully implement ODR. On a branchwide basis, developing master service agreements with ODR solution vendors after completing a request for proposal process would allow interested judicial branch entities to engage with commercial vendors on a shorter time frame. This would provide an economy of scale and reduce the effort required by individual courts to implement an ODR solution.

Buy versus build is always a question to be answered when considering the implementation of new technology. Two states, Utah and Connecticut, have built custom solutions for specific ODR implementations. Should a California court or the branch consider building a custom solution as opposed to engaging with a commercial vendor, collaborating with other courts to develop a solution that could be implemented on a statewide basis may be a benefit branchwide.

Funding for any new program or services is always a consideration for California courts. When considering an ODR implementation the funding issues are both short term and long term. Depending on whether there is statewide interest or local interest can also impact how funding is pursued. Most branchwide requests for new funding will involve a longer process. Whether funding a branchwide or a local program, beginning a new program always requires an infusion of effort, and thus funds. Engaging with a commercial vendor also requires this same infusion of effort at the outset. Once an ODR program is operationalized, long-term funding remains one of the considerations that should be addressed long before launch. The use of commercial vendors is an ongoing cost. Using mediators to assist in the program may also be an ongoing cost. Courts must

determine how they are going to manage these costs, whether by passing them on to the litigants or making them a part of the services provided without fee to the litigants.

To move this technology forward on a branchwide basis, sharing knowledge, experience, and information is vital. Collaboration with and among the early adopter or any pilot courts will benefit those courts as well as any who implement ODR in the future. This collaboration should be coordinated so that information-sharing guides are available between and among courts. Implementing ODR is not without potential challenges and pitfalls. Sharing information, challenges, roadblocks, and best practices is vital to the success of each implementation.

Should individual courts move into ODR as early adopters or pilot courts they should take into account a variety of key considerations prior to committing to and implementing an ODR solution. Understanding the problem to be solved and setting out baseline and key metrics for evaluating the success of an ODR program is vital. Once baseline metrics have been established, identify how ODR will address solving the problem. Engaging with partners and stakeholders as well as developing a notification or marketing plan have uniformly been suggested as best practices by courts and vendors. Ultimately courts will need to decide on funding mechanisms and whether participation in their ODR program will be mandatory rather than voluntary. Understanding and preparing for any needed training, access, or support issues will also be needed. As the ODR program becomes operationalized, courts should continue to measure key metrics, evaluate goals that were set, and make any changes needed to improve the program and goals.

Considerations related to rule and statutory changes to accommodate ODR suggest that as we consider moving into mandatory participation and charging litigants a fee for participation, rule and legislative changes will be needed. Some consideration may also be required for accepting fully digitized signatures on an ODR-negotiated agreement. Further, as courts move into specific areas of ODR implementation in which the Legislature has covered much of the law (e.g., unlawful detainer, family law, etc.), attention will need to be given to more specific statutory and rule changes.

The ODR arena is still new and emerging. Areas for successful use of ODR include small claims, traffic, family, landlord-tenant, and collections. As courts continue to move into these and other arenas, changes to statutes and rules may be needed to pave the way for providing this new type of remote access to our court users.

APPENDIX A: 2020 ANNUAL AGENDA

Existing Workstream (Ending 2020)	
11. Online Dispute Resolution (ODR): Research	***Priority 2***
	Scope category(ies): **Possibilities**

Project Summary: Identify and evaluate available ODR technologies and potential scenarios in which ODR might benefit the judicial branch and its court users.

Key Objectives:

(a) Identify core team (sponsor and leads); form group membership; hold kickoff meeting(s).

(b) Identify and evaluate available ODR technologies.

(c) Review findings from existing court-offered ODR programs.

(d) Evaluate and describe use case scenarios where ODR might be beneficially deployed in the judicial branch.

(e) Survey and document best practices in evaluating feasibility and program design to maximize access to justice.

(f) Review rules and statutes to identify areas where possible amendments will be needed.

(g) At the completion of these objectives, present findings and recommendations to, and seek approval from ITAC, JCTC and, if appropriate, the Judicial Council and formally sunset the workstream.

Origin of Project: *Tactical Plan for Technology 2019–2020*

Status/Timeline: December 2020

Resources:

- ITAC: Workstream: Sponsor: Hon. Julie Culver
- Judicial Council Staffing: Information Technology, Legal Services
- Collaborations: CEAC; TCPJAC; Civil and Small Claims Advisory Committee

APPENDIX B: WORKSTREAM MEMBERSHIP

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Ms. Sarah Hodgson
Administrative Attorney and
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APPENDIX C: RESOURCES

Listed below are resources of interest about online dispute resolution in the courts.

- National Center for State Courts, "ODR: Online Dispute Resolution" (undated), www.ncsc.org/odr
- Joint Technology Committee (JTC) of Conference of State Court Administrators, National Association for Court Management, and National Center for State Courts, "ODR for Courts," *JTC Resource Bulletin* (Nov. 2017), www.ncsc.org/__data/assets/pdf_file/0031/18499/2017-12-18-odr-for-courts-v2-final.pdf
- Joint Technology Committee etc., "Case Studies in ODR for Courts," *JTC Resource Bulletin* (Jan. 2020), www.ncsc.org/__data/assets/pdf_file/0033/39579/JTC-Resource-Bulletin-Case-Studies.pdf
- National Center for State Courts, *Eight Lessons to Consider for ODR Implementation* (undated), www.ncsc.org/__data/assets/pdf_file/0020/58016/8-Lessons.pdf
- The Pew Charitable Trusts, *Online Dispute Resolution Offers a New Way to Access Local Courts* (Jan. 2019), www.ncsc.org/__data/assets/pdf_file/0027/39582/Pew-ODR-Fact-Sheet-January-2019.pdf
- National Center for State Courts, "Tiny Chat 20: Online Dispute Resolution," Vimeo video, 13:30, posted Aug. 31, 2020, https://vimeo.com/453257947
- National Center for State Courts, "ODR and Community-based Payment," Vimeo video, 59:12, posted Sept. 25, 2020, https://vimeo.com/461844425
- Arno R. Lodder & Ernest M. Thiessen, "The Role of Artificial Intelligence in Online Dispute Resolution," Proceedings of the U.N. Economic Commission for Europe Forum on ODR 2003, www.mediate.com/Integrating/docs/lodder_thiessen.pdf
- Arno R. Lodder & John Zeleznikow, "Artificial Intelligence and Online Dispute Resolution," chapter 4 in *Online Dispute Resolution: Theory and Practice*, Mohamed Abdel Wahab, Ethan Katsh & Daniel Rainey, eds. (2011), www.mediate.com/pdf/lodder_zeleznikow.pdf
- Community Mediation Services & Michigan Supreme Court, "MI-Resolve" (undated), https://cii2.courtinnovations.com/MICMS
- Utah Courts, "Online Dispute Resolution (ODR) Pilot Project," www.utcourts.gov/smallclaimsodr/
- Utah Standing Order No. 13 (Small Claims Online Dispute Resolution Pilot Project), www.utcourts.gov/resources/rules/urap/docs/13.pdf

- Paula Hannaford-Agor et al., *Impact of the Utah Online Dispute Resolution (ODR) Pilot Program: Final Report* (National Center for State Courts, Dec. 10, 2020), www.ncsc.org/__data/assets/pdf_file/0025/57823/NCSC-UT-final-2020.pdf
- Stacy Butler et al., *The Utah Online Dispute Resolution Platform: A Usability Evaluation and Report* (Sept. 8, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696105
- Franklin County Municipal Court (Columbus, OH), "Franklin County Municipal Court ODR and Mediation Data Project," https://sites.google.com/view/fcmcdataproject/about